

OFFICE OF THE PUBLIC DEFENDER
ATTORNEY PRO BONO POLICY

1. PURPOSE AND SCOPE. This policy addresses the performance of pro bono legal services by attorneys employed in the executive branch of government, excluding attorneys employed by the secretary of state, attorney general, auditor, superintendent of public instruction, and public service commission, who are subject to the policies promulgated by those officers.

2. DEFINITIONS.

2.1 "Pro bono legal services" means legal services described in Mont.R.Prof.Conduct 6.1, which are performed without the expectation of compensation for:

- a. low income low income individuals who otherwise lack the ability to retain attorneys to provide legal services for them;
- b. charitable, civic, community, governmental, health and education organizations in matters which are designed to assist person of limited means;
- c. individuals, groups or organizations seeking to secure or protect civil rights; or
- d. improve the law, legal system or the legal profession.

3. GENERAL POLICY. Approximately 190,000 low income Montanans are eligible for free legal assistance from the Montana Legal Services Association ("MLSA") based on applicable income eligibility guidelines. Currently MSLA is staffed at a level of one attorney for each 17,270 eligible recipients. This compares with a ratio of one Montana attorney for every 330 residents. The Helena MLSA office has one full-time lawyer devoted to more than four counties. By any standard, there is a large unmet need for legal services for low income persons in Montana. The Montana Supreme Court has adopted a Rule of Professional Conduct that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay" and that "[a] lawyer should render at least 50 hours of pro bono publico legal services per year." Mont.R.Prof. Conduct 6.1. It is the policy of the Public Defender's Office to encourage attorneys to volunteer to provide pro bono legal services in compliance with this policy and other applicable provisions of Montana law and the Montana Rules of Professional Conduct for lawyers.

4. USE OF AGENCY RESOURCES.

4.1 Hours of Work. Executive branch attorneys are encouraged to seek pro bono opportunities that can be accomplished outside of scheduled working hours.

However, pro bono legal services activities may sometimes occur during work hours. Supervisors are encouraged to be flexible and to accommodate, where feasible, the efforts of the attorneys they supervise to perform pro bono services. Employees seeking to participate in pro bono activities during regularly scheduled work hours may be granted annual leave, compensatory time off, or leave without pay, consistent with policies governing the use of such leave by state employees generally. Supervisor's decisions as to the authorization of leave may not be influenced by a supervisor's personal views regarding the substance of the pro bono activity.

4.2 Use of Office Equipment. Pro bono legal services are services provided in the public interest and in satisfaction of an ethical obligation of all attorneys to ensure that legal services are made available to persons of limited economic means. The Congress of the United States has recognized that this is not a private matter by authorizing the expenditure of tax dollars for the support of the national Legal Services program. Pro bono legal services therefore do not constitute the "private business" of the attorney for purposes of Mont. Code Ann. § 2-2-121(2)(a). Nevertheless, respect for the public trust requires that public agency attorneys refrain from inappropriate use of state resources for purposes not connected to the agency's mission. Use of law books or on-line resources for which there is no usage-based charge in the performance of pro bono services involves only a negligible additional expense, if any, and is therefore permissible. When office computers, printers, and telephones are used in moderation for pro bono legal services, there is only negligible additional expense to the State for electricity, ink, and wear and tear, and such use therefore is permissible as long as the agency is reimbursed for supplies in accordance with Section 8, below.

This policy does not authorize the use for pro bono services of commercial electronic services for which there is a usage-based charge to the State.

Consistent with this policy, executive branch attorneys may use office telephone and facsimile machines for essential pro bono-related communication as long as no long distance or other additional usage-based charges to the State are incurred, the agency is

reimbursed for any fax paper used in connection with the pro bono services, and the usage does not interfere with official business.

This policy does not supersede agency policies designed to protect the safety or security of computer or local area network operations. Any use of agency-provided equipment for pro bono activities must be consistent with such policies.

This policy is also subject to any restrictions arising from law or contract on the use of agency equipment or supplies.

Executive branch attorneys should contact their supervisors if there is any question as to whether an activity involves “negligible additional expense,” interferes or threatens to interfere with official business, and is consistent with agency computer security policies or legal or contract restrictions on use of equipment or supplies.

4.3 Clerical Support. An attorney may not assign or otherwise require pro bono legal services of clerical or administrative support personnel. Office support personnel who are willing to volunteer to assist with the provision of pro bono legal services by agency attorneys may do so as long as the volunteer work does not interfere with the performance of the primary responsibilities to official duties. Professional support staff who serve as volunteers in pro bono services shall take leave or compensatory time for time used during the work day or develop a flexible work schedule with their supervisor in accordance with office policy.

4.4 Letterhead. A public defender attorney may not use office letterhead or agency or office business cards in the performance of pro bono legal services.

5. CONFLICT OF INTEREST.

5.1 General. Public defender attorneys are bound by the Rules of Professional Conduct for attorneys and the ethical rules governing state employees to avoid conflicts of interest. These attorneys may not accept pro bono clients in matters which create or appear to create a conflict of interest with their work for the State. Such a conflict exists, among other situations, if a pro bono representation would require the attorney’s recusal in a matter involved in the attorney’s official duties.

5.2 Prohibited actions. Given the public defender’s role in criminal cases and in cases involving the State of Montana, public defender attorneys may not undertake pro bono representation in any case involving: (a) actual or suspected abuse against a partner or family member, or any other criminal conduct by one or both

parties: or (b) an administrative or judicial proceeding in which the State of Montana or any political subdivision thereof is a party, or in which state interests are likely to be involved, *except* that a public defender attorney may participate in a case in which the State of Montana. Department of Public Health and Human Services ("DPHHS") is providing child support enforcement services under Title IV-D of the Social Security Act to one or more of the parties. [See Mont. Code Ann. § 40-5-202(5)]. In any such case, the public defender attorney must make it clear to both the client and DPHHS that the attorney is acting in his or her individual capacity and that the attorney will not continue to represent the client should there be an appeal to the Montana Supreme Court.

6. FORMALITIES OF REPRESENTATION.

6.1 Retainer Agreement. Public defender attorneys subject to this policy shall use the model retainer agreement attached to this policy, making explicit to a pro bono client that the attorney is acting in his or her individual capacity and not as a representative of the State of Montana. The client must sign the agreement acknowledging that fact.

6.2 Malpractice Insurance. The State of Montana does not provide malpractice insurance coverage for the pro bono activities of its attorneys, since such activities are outside the course and scope of the attorneys official duties. See Mont. Code Ann. § 2-9-305.

7. USE OF OFFICIAL POSITION OR PUBLIC OFFICE. Public defender attorneys subject to this policy who provide pro bono legal services may not indicate or represent in any way that they are acting on behalf of the State or any agency or office of the State, or in their official capacity. The incidental identification of the public defender attorney as a State agency employee - for example, when an office post office box address or telephone number is used - is not prohibited. The public defender attorney is responsible for making it clear to the client, any opposing parties, or others involved in the pro bono case, that the attorney is acting in his or her individual capacity as a volunteer and not as a representative of the State or any of its agencies. Generally, state offices may not be used for meetings with clients or opposing counsel in a pro bono case unless the office space is a common area in building not associated only with the public defender's office.

8. REIMBURSEMENT. Public defender attorneys subject to this policy must reimburse their agencies for costs associated with printing, photocopying, long distance telephone charges, or faxing. When a public defender attorney accepts a pro bono case, the attorney

shall keep a log of the number of pages printed on office printers, the number of pages copied on office photocopiers, and the number of pages received over an office facsimile machine. The attorney shall reimburse the state at the rate of fifteen cents per page, payable in one lump sum by May 31 of each fiscal year. Public defender attorneys should use their personal credit cards for any long distance phone charges; however, if a long distance telephone call must be made that results in a charge to the state, the attorney shall report the call on the case log and reimburse the office for the actual amount of the call. The attorney shall request prior permission from his or her supervisor if the anticipated costs exceed \$50 per case.

9. DISCLAIMER. This policy is intended only to encourage increased pro bono activities by public defender attorneys and is not intended to create any right or

benefit, substantive or procedural, enforceable at law by any party, against the State of Montana, its agencies, officers, or any person.

10. PERSONAL FAMILY LEGAL MATTERS. Notwithstanding any other provision of this policy, a public defender attorney may perform personal and family legal services, including counseling family members in matters involving criminal law, provided the activity does not interfere with the proper and effective performance of the attorney's official duties.

DATED this _____ day of _____ 2006.

RANDI HOOD, Chief Public Defender
Office of the Montana State Public Defender

RETAINER AGREEMENT

The undersigned client [CLIENT] engages the undersigned attorney (ATTORNEY) for legal representation in the following matter:

ATTORNEY will make no charge to the client for attorney fees in the matter. CLIENT acknowledges that ATTORNEY is acting in ATTORNEY'S individual capacity and is not acting as a representative of the State of Montana, Department/Office of _____, or any other state agency.

CLIENT will cooperate fully with ATTORNEY and will provide all information known by or available to CLIENT which may aid ATTORNEY in representing CLIENT.

CLIENT authorizes and directs ATTORNEY to take all actions which ATTORNEY deems advisable on CLIENT's behalf. ATTORNEY agrees to notify CLIENT promptly of all significant developments and to consult with CLIENT in advance as to any significant decisions concerning those developments.

ATTORNEY will represent CLIENT diligently but makes no promises or representations as to the success of those efforts. ATTORNEY may terminate representation of CLIENT: (1) if ATTORNEY believes further action is not justified on behalf of CLIENT, or (2) if CLIENT does not cooperate with ATTORNEY.

CLIENT is responsible for any costs incurred other than attorney's fees. Efforts shall be made to waive costs whenever possible.

This Retainer does not cover an appeal. In the event an appeal becomes possible, ATTORNEY will decide at that time whether or not to further represent CLIENT.

DATE

CLIENT

ATTORNEY